



ACHP GUIDANCE ON PROGRAM COMMENTS AS A PROGRAM ALTERNATIVE

Introduction

*Program Comments*¹ are an alternate method for federal agencies to meet their Section 106 obligations. Program comments are one of five program alternatives which allow agencies to tailor Section 106 to meet the needs of the agency [see §800.14 for a description of all the program alternatives]. Using the option of Program comments are intended to give the ACHP flexibility to issue comments on a federal program or class of undertakings in lieu of commenting on such undertakings on a case-by-case basis. The ACHP may also issue program comments at the request of a federal agency or on its own initiative.

Section 800.14(e) of the ACHP's regulations sets forth the process for issuing such comments. Federal agencies must consider, but are not obligated to follow, the ACHP's comments. If an agency does not follow the ACHP's comments, the ACHP may withdraw them, in which case the agency will continue to comply with Section 106 in its usual case-by-case basis.

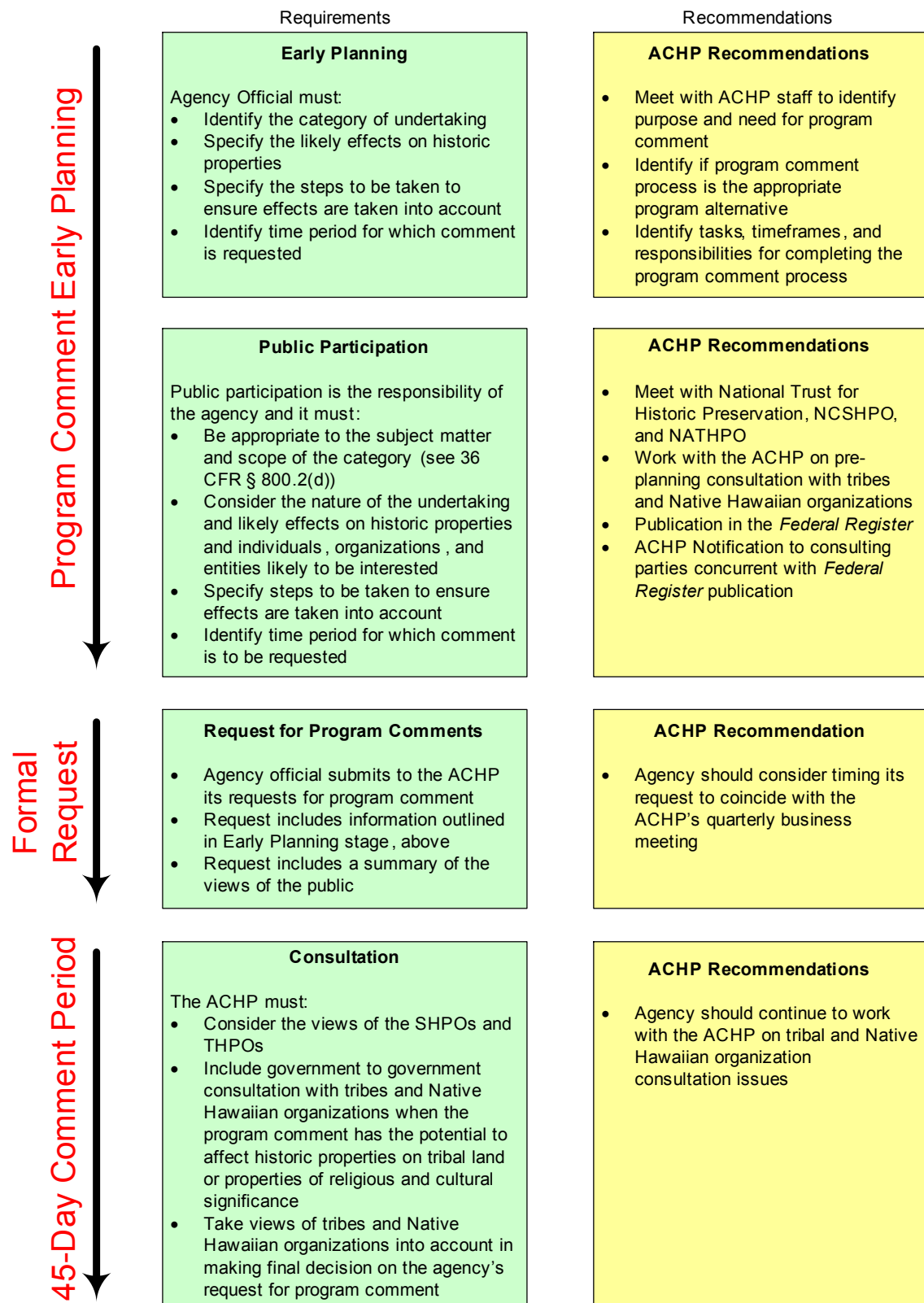
Format of this Guidance

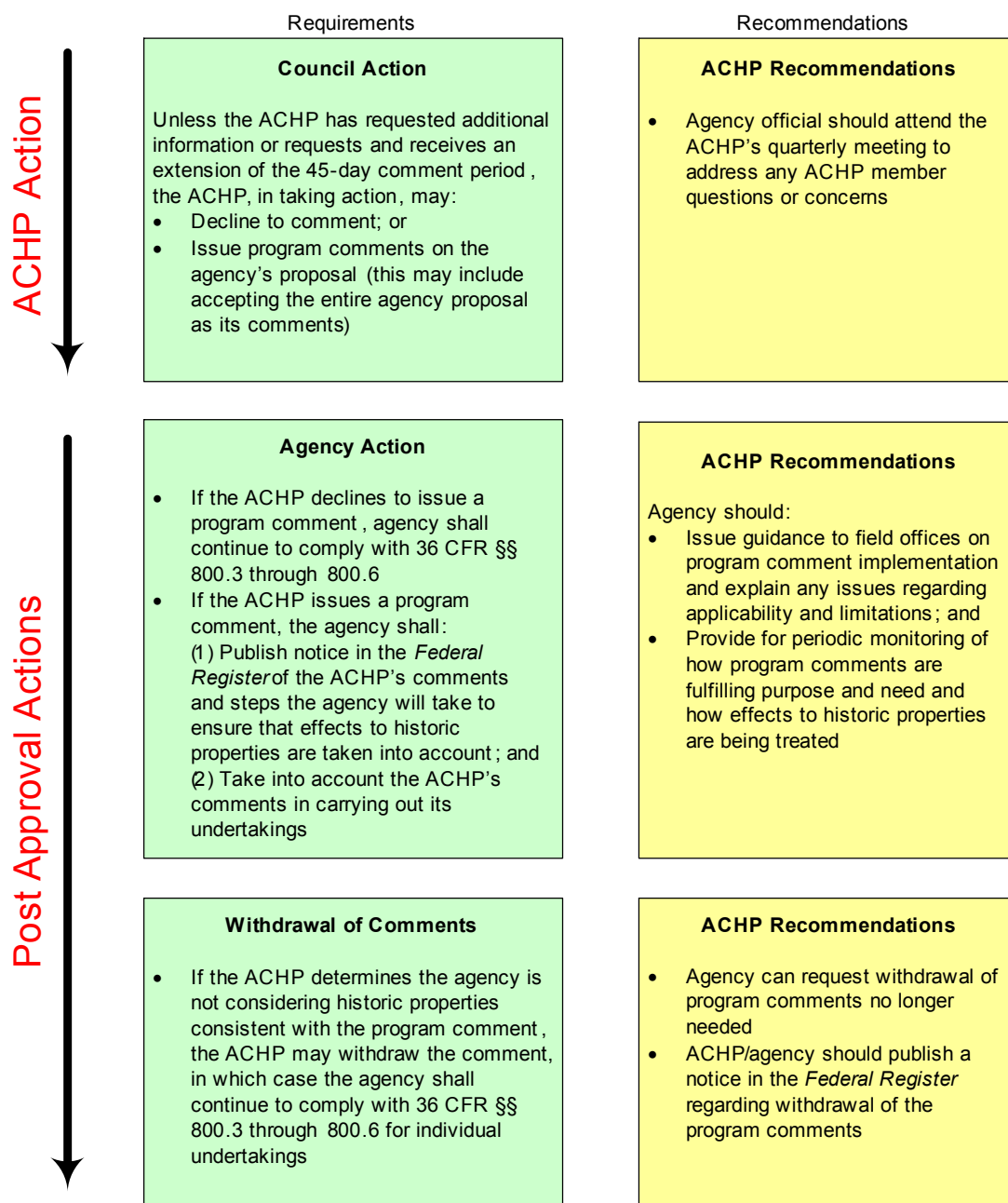
The following table identifies the steps in the program comment process as outlined in the ACHP's regulations. The left hand column provides requirements in the program comment process while the right hand column provides corresponding ACHP recommendations to federal agencies. These recommendations help the ACHP in reviewing an agency's needs for program comments, planning consultation, reducing delays in issuing program comments, and ensuring adequate monitoring of issued program comments.

Following the table, the ACHP has developed a series of questions and answers regarding the program comment process. Answers to questions are based on the requirements found in the ACHP's regulations, past experience in approving program comments and recommendations that have been developed based on this past experience. The ACHP welcomes additional questions that users may have on program comments and this guidance. Questions should be sent to achp@achp.gov with the following subject line: "RE: ACHP Program Comment Guidance."

¹ This guidance applies only to program comments issued by the ACHP as a federal agency program alternative under §800.14. It does not apply to comments issued by the ACHP as part of termination under §800.7

PROGRAM COMMENT PROCESS





Questions and Answers

What are the benefits of the program comment process?

The primary benefit of program comments is that it allows a federal agency to comply with Section 106 of the National Historic Preservation Act (NHPA) in a single action for a class of undertakings rather than addressing each undertaking as a single action. This is especially advantageous to those federal agencies that may have repetitive management actions for a large inventory of similar types of historic properties or for those agencies that have programs that generate a large number of similar undertakings. The ACHP has issued a program comment to the Department of Defense (DoD) to assist it in managing its inventory of Wherry and Capehart military family housing built during the Cold War era. DoD estimated this single

compliance action allowed it to avoid \$82 million in administrative costs by not having to address each of these housing units on an individual basis.

A secondary benefit of program comments is that it allows an agency's headquarters to achieve a much broader perspective of classes of historic properties than an agency's field office typically possesses. Many federal agencies have had construction programs funded by Congress that authorize similar buildings or structures to be built across the nation. Program comments will typically focus on the larger program including individual resources that may have been constructed under the program. In this way, the program comment allows an agency to put individual resources into a national historic context.

Are program comments appropriate for all classes of undertakings or agency programs?

No. Program comments are not appropriate in all situations. For example, program comments would not be appropriate to handle Section 106 compliance requirements for categories of undertakings that may affect few historic properties. Similarly, it may not be appropriate to seek program comments where an agency has a large number of historic properties but has infrequent undertakings that may actually affect these properties. Program comments may also be inappropriate for classes of undertakings or programs that are likely to be highly controversial in nature. Agencies considering program comments can contact the ACHP to discuss the appropriateness of program comments for their needs. The ACHP makes its decision on a case-by-case basis based on the nature and scope of the agency proposal.

Who can make requests for program comments?

Because program comments are a method of handling broad classes of resources or agency programs, program comment requests typically come from an agency's headquarters level. The ACHP will typically not issue program comments to an agency's field or regional offices unless an agency can demonstrate a particular class of undertaking is limited to that field or regional office and it has wide applicability to numerous undertakings.

The ACHP can also issue program comments on its own initiative [800.14(e)]. In reviewing federal agency missions and the nature of their undertakings, the ACHP may determine a category of undertakings or a federal program would be most appropriately addressed by a program comment. While the ACHP may issue such a program comment, it is up to the agency official [800.2(a)] to decide whether to follow it. Since revising its regulations, the ACHP has not issued any program comments on its own initiative.

Does my agency need to justify the use of program comments?

The ACHP recommends agencies provide justification as to why the program comment process is necessary to comply with Section 106. Since the program comment process is a resource-intensive process on the part of the ACHP, we want to be assured a need exists to deviate from the standard Section 106 process, or that another program alternative might not better meet an agency's needs.

What should my agency do prior to requesting a program comment?

Although not a requirement, the first, and the most important, step prior to beginning the program comment process is for an agency to meet with ACHP staff. This initial meeting will allow the agency to identify the need for a program comment, the historic properties likely to be affected, and the classes of undertakings or programs that might be addressed. This initial meeting will give agency and ACHP staffs an opportunity to assess whether the program comment process is appropriate to meet the agency's needs before committing time and resources in developing more detailed mitigation or treatment measures.

If the agency decides to move forward with requesting a program comment, it should notify the ACHP, in writing, of its intent to request program comments. This will allow the ACHP to assist the agency in planning the public comment and consultation process, and it will help the ACHP to anticipate the resources necessary to move the program comment process forward. Once the agency has notified the ACHP of its intent to request program comments, the ACHP recommends the agency meet with the ACHP and other stakeholders such as the National Trust for Historic Preservation, the National Conference of State Historic Preservation Officers, and/or the National Association of Tribal Historic Preservation Officers to begin to seek input on development of its program comment proposal.

What is my agency's responsibility in the program comment process?

The agency must first identify the category of undertaking, specify the likely effects on historic properties, specify the steps to be taken to ensure effects are taken into account, and identify the time period for which a comment is requested [\[800.14\(e\)\(1\)\]](#).

The agency is then responsible for the public participation process. The agency must arrange for public participation appropriate to the subject matter and the scope of the category for which program comments will be sought providing to the public the information outlined in the paragraph above [\[800.14\(e\)\(2\)\]](#). The ACHP has no specific requirements as to how an agency carries out its public participation process. Agencies are encouraged to use their own public participation procedures and mechanisms to the greatest extent possible, especially where these procedures also fulfill the requirements of other federal statutes such as the National Environmental Policy Act [\[see 800.2\(d\)\]](#).

The ACHP strongly recommends the agency work with ACHP staff in the public participation process. In order to provide the maximum time for consultation, the ACHP can begin to notify consulting parties of the agency's intent to request program comments and provide consulting parties with the agency's public notice. Since the ACHP will be required to act on an agency's program comment request within 45 days [\[800.14\(e\)\(5\)\]](#), this advanced notification during the agency's public participation process provides additional time for consulting party involvement.

The public participation process must be completed prior to requesting program comments as a summary of the public's views will form a part of the agency's submittal to the ACHP [\[800.14\(e\)\(1\)\]](#). The request should be addressed to the executive director of the ACHP. In addition to this summary of the public's views, the agency's request must provide the ACHP with the category of undertakings to be considered under the program comment, the likely effects on historic properties, the steps the agency will take to ensure that the effects are taken into account, and the time period for which the program comment is being requested [\[800.14\(e\)\(1\)\]](#).

What is the ACHP's responsibility in the program comment process?

Upon receiving a formal request for program comments, the ACHP is responsible for consultation with SHPOs/THPOs [\[800.14\(e\)\(3\)\]](#). The ACHP will notify the SHPOs/THPOs and consider their views on the proposed program comment. The process that the ACHP has used for this consultation includes publishing a "notice of intent to issue program comments" in the *Federal Register*. At the time of publication, the ACHP will request, by e-mail, SHPO/THPO views on the agency's proposal. Included in this broadcast e-mail are the *Federal Register* notice, the ACHP's point of contact for further questions, and the due date for submission of views (typically 30 days).

The ACHP is also responsible for consultation with Indian tribes and Native Hawaiian organizations when a proposed program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization [\[800.14\(e\)\(4\)\]](#). The ACHP will ensure that development of its program comments will include appropriate government-to-government consultation with affected Indian tribes [\[800.14\(f\)\]](#). Where an

agency's proposal is nationwide in scope, the ACHP will consult in accordance with existing Executive Orders, presidential memoranda, and applicable provisions of law [800.14(f)(1)]. The ACHP will make summaries of the views, along with written comments provided by affected Indian tribes and Native Hawaiian organizations, part of the official program comment record and will take those views into account in reaching a final decision on issuing a program comment [800.14(f)(2)].

Because the ACHP's consultation process takes up two-thirds of the 45 days in which the ACHP has to respond to an agency's request, it is strongly recommended that the agency and the ACHP work closely together in the process leading to the ACHP's issuance of a program comment. Program comment requests received by the ACHP without previous knowledge of an agency's intent do not provide ACHP staff appropriate time to prepare the required information for the *Federal Register* notice, which significantly shortens the SHPO's and THPO's opportunity to provide their views. In these cases, the ACHP would likely decline to issue program comments.

How long does the program comment process take?

While the ACHP has 45 days to respond to a formal request for program comments, an agency should understand that the entire process will take considerably longer. Initial meetings, development of the program comments, and an agency's public participation process all add time to the program comment process. While there is no set time in which this advance work must be completed, the length of time it will take an agency depends on the nature of the requested program comments and the amount of time and resources both the agency and the ACHP dedicate to the effort. The ACHP's experience is that the program comment process typically takes from one to two years to complete.

When do SHPOs/THPOs become involved in the program comment process?

The consultation process with SHPOs and THPOs is the responsibility of the ACHP. This consultation does not begin until after the ACHP has received a request to consider a proposed program comment from an agency [800.14(e)(2)]. However, the agency is responsible for public participation, which must be done prior to submitting a request for proposed program comment to the ACHP. In developing a proposed program comment the agency must take into consideration any views submitted by the public as part of their public participation process [800.14(e)(1)].

The ACHP strongly recommends that agencies work closely with the ACHP during the agency's public participation process so we can notify SHPOs/THPOs in the early stages of an agency's program comment development. This allows SHPOs/THPOs to comment directly to the agency with any concerns they may have, and it also helps them develop issues for the following ACHP consultation process. While the timing of the agency public participation process is not set by the ACHP, the ACHP consultation process must be completed within the 45-day review period provided for in the ACHP's regulations [800.14(e)(5)]. The ACHP will strive to work with agencies to allow for maximum SHPO/THPO consultation.

What is the ACHP's process for issuing program comments?

Program comments are issued by ACHP members. Over the course of developing the program comments, ACHP staff will brief the members on the nature of the program comments and the agency's efforts in developing an appropriate proposal. These briefings take place during the ACHP's quarterly business meetings. While not necessary, the ACHP prefers to coordinate final issuance of program comments at its quarterly business meetings in order to allow open discussion of an agency's proposal before a vote is taken. Issuance of program comments by a vote of the membership is provided for in Section III(M) of the *Operating Procedures of the Advisory Council on Historic Preservation*.

Can the ACHP's issuance process exceed 45 days?

Yes, but only if the agency official [\[800.2\(a\)\]](#) grants the ACHP an extension on its 45-day period [\[800.14\(e\)\(5\)\]](#). Extensions have been granted to allow ACHP members further time to consider an agency's proposal or to allow the ACHP to coordinate the issuance process with one of its quarterly business meetings.

What happens if the ACHP declines to comment?

If the ACHP declines to comment on an agency's proposal, the agency must continue to comply with the requirements of §§ 800.3 – 800.6 for all individual undertakings [\[800.14\(e\)\(5\)\(ii\)\]](#).

What responsibilities does my agency have after the program comment is issued by the ACHP?

When the ACHP issues a program comment, the agency official [\[800.2\(a\)\]](#) will take into account the ACHP's comments in carrying out its undertaking within the category for which the program comment was granted. The agency must also publish a notice in the *Federal Register* of the ACHP's comments and the steps the agency will take to ensure that effects to historic properties are taken into account [\[800.14\(e\)\(5\)\(i\)\]](#).

Program comments that have been issued by the ACHP in the past have included treatment and/or mitigation requirements as part of the agency's responsibilities. The ACHP will work with the agency to develop an appropriate schedule for completion of any requirements. This completion schedule may be part of the program comment or may be completed shortly after issuance.

Once the ACHP has issued a program comment, an agency will typically provide guidance to its field operating offices to interpret the agency's implementation of the program comment in relation to other federal statutes and regulations and the agency's own internal policies and regulations.

How are consulting parties and the public involved in an agency's program comment after the ACHP's approval?

While ACHP regulations do not provide a formal role for consulting parties or the public after it issues a program comment, the ACHP is interested in receiving comments or answering questions concerning an agency's implementation of program comments. The ACHP uses these comments to assist in reviewing changes that may be needed in the program comment process, in clarifying our guidance, in issuing future program comments to other agencies, and in deciding whether to consider withdrawing previously issued program comments.

What happens if the ACHP withdraws a previously issued program comment?

The ACHP can withdraw a previously issued program comment if it determines that an agency's consideration of historic properties is not being carried out in a manner consistent with the program comment. If the ACHP withdraws a program comment, the agency must continue to comply with the requirements of §§ 800.3 – 800.6 for all individual undertakings [\[800.14\(e\)\(6\)\]](#). If the ACHP withdraws a program comment, it will publish a notice in the *Federal Register* and notify SHPOs, THPOs, and other consulting parties regarding the withdrawal.

Once a program comment is issued, does the ACHP monitor its implementation?

The ACHP recommends that an agency consider a process for monitoring a program comment and include the process as part of its proposal. An agency should consider how it can accomplish two goals for monitoring. The first goal should be to ensure that the products required under the program comment are produced in a timely manner and are provided to those SHPOs/THPOs and other parties that were involved in the consultation process. This may be done by providing copies of documentation produced under the program comment directly to consulting parties or by posting results on an agency Web site. The second goal of monitoring should be to measure the outcomes of having approached Section 106 requirements through the program comment process. The agency should be able to address whether the program comment has produced the desired results expressed in their purpose and needs statement and whether the program comment has had the desired effect on the agency's historic properties. The agency should consider implementing a baseline assessment of the historic properties falling under an issued program comment so that later monitoring can be measured against this baseline.

Posted: March 5, 2007